STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2010-AP-000232

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

ABBOTT LABORATORIES, ASTRAZENECA LP, ASTRAZENECA PHARMACEUTICALS LP, AVENTIS BEHRING, LLC F/K/A ZLB BEHRING, LLC, AVENTIS PHARMACEUTICALS, INC., BEN VENUE LABORATORIES, INC., BOEHRINGER INGELHEIM PHARMACEUTICALS, INC., BOEHRINGER INGELHEIM ROXANE, INC., BRISTOL-MYERS SQUIBB CO., DEY, INC., IVAX CORPORATION, IVAX PHARMACEUTICALS, INC., JANSSEN LP F/K/A JANSSEN PHARMACEUTICA PRODUCTS, LP, JOHNSON & JOHNSON, INC., MCNEIL-PPC, INC., MERCK & CO. F/K/A SCHERING-PLOUGH CORPORATION, MERCK SHARP & DOHME CORP. F/K/A MERCK & COMPANY, INC., MYLAN PHARMACEUTICALS, INC., MYLAN, INC., F/K/A MYLAN LABORATORIES, INC., NOVARTIS PHARMACEUTICALS CORP., ORTHO BIOTECH PRODUCTS, LP, ORTHO-MCNEIL PHARMACEUTICAL, INC., PFIZER INC., ROXANE LABORATORIES, INC., SANDOZ, INC. F/K/A GENEVA PHARMACEUTICALS, INC., SICOR, INC. F/K/A GENSIA SICOR PHARMACEUTICALS, INC., SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE, INC., TAP PHARMACEUTICAL PRODUCTS, INC., TEVA PHARMACEUTICALS USA, INC., WARRICK PHARMACEUTICALS CORPORATION, WATSON PHARMA, INC. F/K/A SCHEIN PHARMACEUTICALS, INC. AND WATSON PHARMACEUTICALS, INC.,

Defendants,

PHARMACIA CORPORATION,

Defendant-Appellant-Cross-Respondent.

APPELLANT'S BRIEF

ON APPEAL FROM THE
CIRCUIT COURT FOR DANE COUNTY,
JUDGE RICHARD G. NIESS, CIRCUIT JUDGE, PRESIDING
Circuit Court Case No. 04-CV-1709

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Answered by the trial court: No.

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Answered by the trial court: No.

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Answered by the trial court: No.

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Answered by the trial court: No.

STATEMENT ON ARGUMENT AND PUBLICATION

Oral argument and publication are appropriate under Wisconsin Statutes §§ 809.22 and 809.23. The issues presented are complex and of substantial and continuing public interest.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

For decades, the State of Wisconsin has reimbursed pharmacists for prescription drugs dispensed to Wisconsin Medicaid ("Medicaid") recipients based on a formula established by the legislature and approved by the Governor, as part of the biennial budget process. One component of the formula is a figure known as AWP, an acronym that originally stood for "average wholesale price."

The legislature knew, however, that the AWP for any given drug was not intended to represent an actual average of prices at which pharmacies purchased the drug from wholesalers, and that a drug's AWP in fact exceeded pharmacists' purchase prices to a significant degree. Accordingly, the State applied a discount to AWP as part of its reimbursement formula. The State knew the discount still afforded pharmacists a profit of the 7% difference between what they paid to buy

drugs from wholesalers and what the State reimbursed them to dispense the drugs to Medicaid recipients.

In establishing the reimbursement formula, the legislature sought to provide pharmacies with sufficient economic incentive to participate in the Medicaid program to ensure that Medicaid recipients would have federally required access to the medicines they need. The legislature and the Governor considered input from Wisconsin pharmacists and their lobbyists, as well as information from the Wisconsin Department of Health and Family Services ("DHFS"), the agency responsible for administering the Medicaid program.[1] Each budget cycle, pharmacists urged the legislature to increase their level of reimbursement, while DHFS urged the legislature to decrease the reimbursement rate. In that context, the legislature set the level of reimbursement it deemed appropriate, as part of the budget process.

This case sought to recover from Pharmacia and other pharmaceutical manufacturers—not the pharmacies that were reimbursed—the profit the legislature knowingly determined pharmacists would be paid. That profit was characterized as "damages" by the State's lawyers, even

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[1] Now the Department of Health Services ("DHS").

though it was the known economic result of legislative decisions. The State sought to recover that profit on fraud theories, even though the State was never deceived.

The State's claims violate the Wisconsin constitution and are contrary to the statutes on which the claims are based. Accordingly, the trial court erred by not dismissing the claims in their entirety. Further, the trial court erred in submitting the case to a jury, in its evidentiary rulings, and in its post-verdict decisions. Finally, the trial court ignored the statutes that govern both the State's retention of private counsel and the manner in which the Wisconsin Department of Justice must conduct cases.

Pharmacia asks the Court to vacate the judgment and dismiss the State's claims with prejudice. To the extent any of the State's substantive claims are not dismissed, the Court should remand for a bench trial.

II. PROCEDURAL STATUS AND DISPOSITION IN THE TRIAL COURT

The State filed this action on June 3, 2004 against twenty pharmaceutical manufacturers, including Pharmacia,[2] alleging violations of

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[2] The State subsequently added seventeen more manufacturer defendants. (*Compare* R. 2, *with* R. 6.)

Wisconsin Statutes 49.49(4m), 100.18, and 133.05, and for unjust enrichment. (R.2.) The trial court granted Pharmacia's summary judgment motion on the § 133.05 claim. (A.Ap. at 142.) The State withdrew its unjust enrichment claim. (R.233 at 56-57.)

The trial court overruled defendants' objections to a jury trial (A.Ap. at 136), and Pharmacia was the first defendant to proceed to trial.[3] On February 16, 2009, a jury found for the State, awarding $2,000,000 on the § 100.18 claim and $7,000,000 on the § 49.49(4m) claim. (A.Ap. at 144-47.) Although the Special Verdict had two damages questions covering overlapping time periods, the trial court concluded the total of the two answers did not duplicate damages. (A.Ap. at 186.)

The trial court denied Pharmacia's post-verdict motions on May 12, 2009 (R.443 at 198:18-21; A.Ap. at 862), but, on May 15, 2009, vacated the answer to Special Verdict Question 5, which was the basis for forfeitures under § 49.49(4m) (A.Ap. at 150). On September 30, 2009, the trial court supplied its own answer to Question 5 and imposed forfeitures totaling $4,578,000. (A.Ap. at 170.) The trial court also entered a permanent injunction. (A.Ap. at 172-73.) On October 26, 2009, the trial

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[3] The trial court ordered a separate trial for each defendant. (A.Ap. at 121.)

court awarded attorneys' fees of $6,503,035.09 and costs of $314,108.44. (A.Ap. at 184.) Judgment was entered November 30, 2009 and Pharmacia filed its notice of appeal on January 21, 2010. (R.404.)

III. STATEMENT OF FACTS

A. Medicaid Reimbursement For Prescription Drugs.

Medicaid is a joint federal-state program that pays for health care provided to low income citizens. 42 U.S.C. § 1396, *et seq*. To participate in the Medicaid program, Wisconsin must ensure that beneficiaries have the same access to services as the general population. 42 U.S.C. § 1396a(a)(30)(A). The federal agency responsible for administering the Medicaid program, the Centers for Medicare and Medicaid Services ("CMS"), monitors states to ensure that reimbursement to providers is sufficient to maintain access to services but also takes economy into account. 42 C.F.R. §§ 447.204, 447.512. Reimbursement must not exceed, in the aggregate, the lesser of (1) "[the Estimated Acquisition Cost ("EAC") of the drug] plus reasonable dispensing fees" or (2) pharmacists' "usual and customary charges." 42 C.F.R. § 447.512(b). EAC is a state's best estimate of the "price generally and currently paid by providers for a drug." 42 C.F.R. § 447.502.

Despite this language, CMS routinely approved reimbursement rates exceeding the amounts pharmacists paid for prescription drugs because CMS recognized such rates were the result of political compromise. (A.Ap. at 575-76, 580-81, 583.) As the trial court observed, "[t]he evidence is compelling that a political tug-of-war between various interest groups spanning a number of successive biennial budget sessions resulted in the adoption of reimbursement formulas that were known to overcompensate participating Wisconsin pharmacies." (A.Ap. at 169.)

This tug-of-war occurred with each biennial budget process, and Pharmacia played no part in it.[4] (R.435 at 176:24-177:21; R.437 at 168:16-169:11; R.439 at 247:17-248:10; A.Ap. at 715-16, 765-66, 820-21.) Early in the Medicaid prescription drug program, the State chose to reimburse using a three-part methodology. (A.Ap. at 283.) For generic drugs, the State reimbursed at Maximum Allowable Cost ("MAC"), which Medicaid established by investigating what pharmacists paid for generic drugs,

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[4] The only evidence of involvement by a pharmaceutical manufacturer in the reimbursement rate setting process were minutes from a 2005 Governor's Pharmacy Commission meeting at which a representative of a pharmaceutical manufacturers' association testified that pharmacists could purchase drugs at 22% below AWP. (A.Ap. at 271-72.)

without reference to published prices. (R.436 at 94:10-100:13; A.Ap. at 730-36; *see also* A.Ap. at 51-52, 54-55.)

For brand drugs, Wisconsin reimbursed at Direct Price for drugs of companies that sold directly to pharmacists, including Pharmacia's predecessor, the Upjohn Company. (A.Ap. at 283.) Wisconsin understood Direct Price to be the price manufacturers charged when they sold drugs directly to pharmacies. (R.439 at 156:2-156:5; A.Ap. at 789.) For all other brand drugs, Wisconsin reimbursed at AWP. (A.Ap. at 283.) Wisconsin bought pricing information from First DataBank, a company that publishes data for pharmaceuticals. (R.435 at 137:7-138:6; R.436 at 163:3-165:11; A.Ap. at 710-11, 740-42.)

Wisconsin chose to use AWP knowing it "overstate[d] actual drug costs" by about 15%. (A.Ap. at 476.) It continued to do so even though, in 1984, the federal Department of Health and Human Services told Wisconsin that "considerable savings will accrue . . . if [Wisconsin] will make a greater effort to determine more closely the price pharmacists pay for drugs rather than using AWP." (A.Ap. at 419.)

In 1989, the federal government informed Wisconsin that "a published AWP level as a State determination of EAC without a significant

discount being applied is not an acceptable estimate of prices generally and currently paid by providers." (A.Ap. at 293 (emphasis in original).) The federal Office of the Inspector General ("OIG") told Wisconsin, "on average, pharmacies buy drugs for 15.5 percent below AWP. We continue to believe that AWP is not a meaningful payment level and that it should not be used for making reimbursements[.]" (A.Ap. at 465.) Wisconsin considered basing reimbursement on actual acquisition cost, but rejected this alternative because it would be "[m]ost unacceptable to providers." (A.Ap. at 295 (emphasis in original); *see also* R.439 at 165:11-166:9; A.Ap. at 795-96.) Wisconsin continued to use AWP, but reduced reimbursement for brand drugs to AWP minus 10%, rather than the 15.5% recommended by the OIG. (A.Ap. at 289.) It continued to reimburse at Direct Price for certain companies (including Upjohn) and at MAC for generics. (A.Ap. at 289.)

In 1997, OIG informed Wisconsin that on average, pharmacists could acquire drugs for 18.3% below AWP. (A.Ap. at 320.) During the 1999-2001 budget cycle, Wisconsin's Legislative Fiscal Bureau ("LFB") advised the legislature that a drug's AWP "is analogous to the 'sticker price' of a car" that "does not reflect the actual cost of acquiring the drug."

(A.Ap. at 348.) The LFB also noted the Pharmacy Society of Wisconsin's position that rate reductions would "threaten a pharmacy's ability to service [Medicaid] recipients." (A.Ap. at 349.)

In 1998, DHFS informed the legislature that reimbursing at AWP minus 10% "over-compensates pharmacy providers for their cost of drugs." (A.Ap. at 191.) DHFS asked the legislature to set the reimbursement rate for brand drugs at AWP minus 18%. (R.439 at 178:25-180:20, 245:16-247:16; A.Ap. at 803-05, 818-20.) The legislature rejected this proposal, and reimbursement remained at AWP minus 10%. (*Id.*) The State also stopped reimbursing at Direct Price, even though it understood it was "the price that . . . manufacturers charged when they sold products directly to . . . retail pharmacies." (R.439 at 155:22-157:6; A.Ap. at 788-90.)

During the 2001-2003 budget cycle, DHFS again informed the legislature that current reimbursement rates compensated pharmacists above their acquisition costs. (A.Ap. at 368.) OIG estimated acquisition costs for brand drugs averaged 21.84% below AWP. (A.Ap. at 549.) DHFS reviewed the report and one staffer lamented: "Guess we should send this over to Legislative staff. Not that it will matter." (A.Ap. at 382.) Recognizing that a more aggressive proposal would fail (R.439 at 247:2-

247:4; A.Ap. at 820), DHFS asked the legislature to reduce reimbursement to AWP minus 15%, which would "bring Wisconsin [Medicaid] payments more in line with the actual acquisition cost of the provider" (A.Ap. at 369). The legislature rejected DHFS's proposal, and set reimbursement at AWP minus 11.25%. (R.439 at 183:22-185:3; A.Ap. at 808-10.)

In 2002, OIG informed the State that Wisconsin pharmacies could purchase brand drugs at roughly 20.52% below AWP (A.Ap. at 300), which was "significantly lower than the Wisconsin Medicaid reimbursement level of AWP minus 11.25%" (A.Ap. at 472). DHFS again urged the legislature to reduce reimbursement to AWP minus 15%, which would leave pharmacists "a margin of 6.84% on average." (A.Ap. at 547.) The legislature rejected the proposal, and set the rate at AWP minus 12% in 2002, and AWP minus 13% in 2004. (R.439 at 209:11-210:13; A.Ap. at 815-16.) The State continues to reimburse based on AWPs to this day. (R.439 at 220:6-220:18; A.Ap. at 817.)

B. Pharmacia.

Pharmacia manufactures both brand and generic drugs. (R.226 at 4.) Pharmacia set two prices for its brand drugs: Wholesale Acquisition Cost ("WAC"), the price at which it sold drugs to wholesalers (*id.* at 5), and

Direct Price, the price at which it sold drugs directly to retailers (*id.*; *see also* R.434 at 211:24-212:2; A.Ap. at 691-92). WAC and Direct Price were almost always the same. (R.226 at 5.) Purchasers could receive a 2% "prompt pay" discount, which was common in the industry. (R.227 at 261.) The State's damages expert acknowledged that all of Pharmacia's brand drugs at issue in this case were sold within 2% of WAC. (R.437 at 36:22-37:7; A.Ap. at 763-64.)

Pharmacia's subsidiary, Greenstone, manufactures and sells generic versions of Pharmacia's brand products after those products lose patent protection. (R.438 at 70:21-71:4; A.Ap. at 774-75.) Wisconsin reimbursed for the vast majority of Greenstone's drugs at MAC. (R.436 at 185:20-186:10, 192:10-193:2; A.Ap. at 747-48, 750-51.) MACs for Greenstone's drugs were determined by the State independent of published prices. (R.436 at 94:10-100:13; A.Ap. at 730-36; *see also* A.Ap. at 51-52, 54-55.)

C. First DataBank.

First DataBank offers data relating to prescription drugs, including pricing, for purchase to a variety of entities. (R.438 at 212:1-212:17; A.Ap. at 777.) Pharmacia provided First DataBank with WACs and Direct Prices for its brand drugs. (R.226 at 6.) Pharmacia sometimes provided a

Suggested Average Wholesale Price, or "Suggested AWP." (A.Ap. at 572-73.) First DataBank took the "Suggested AWP" and used it to populate a data field in the information it sold to customers called Suggested Wholesale Price, or "SWP." (R.434 at 230:5-231:24; R.438 at 213:13-215:11; A.Ap. at 699-700, 778-80.) Wisconsin chose not to purchase SWP information. (A.Ap. at 38.) Rather, Wisconsin chose to purchase "Bluebook AWP." (R.434 at 219:17-219:23, 226:12-227:4; A.Ap. at 693, 695-96.) Information from manufacturers was not used to calculate Bluebook AWP. (R.438 at 212:18-213:12; A.Ap. at 777-78.) First DataBank independently calculated and published Bluebook AWPs for Pharmacia's drugs. (R.438 at 212:18-214:16; A.Ap. at 777-79.)

D. The Trial.

From its opening statement, the State[5] admitted it chose to use AWP knowing AWP exceeded pharmacists' acquisition costs. (R.433 at 57:23-58:8; A.Ap. at 676-77.) It presented no evidence that Pharmacia told anyone, in Wisconsin or elsewhere, that "AWP" represented an actual

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[5] The State's case was financed and prosecuted primarily by private plaintiffs' lawyers. (R. 327.) The State retained these lawyers in September 2007, three years after they began work on the case in June 2004, when the Governor said they could not represent Wisconsin. (A.Ap. at 108.) Pursuant to a fee agreement with the State, the attorneys were not entitled to a fee or costs from the State. (A.Ap. at 111.) *See, infra*, Argument Section XII.

average of wholesale prices, or that it was deceived by anything Pharmacia said or did. Instead, the State argued that if DHFS had known actual prices, it would have been better able to persuade the legislature to set lower reimbursement. (R.435 at 71:15-74:17, 183:2-184:1; A.Ap. at 704-07, 718-19.) It argued that Pharmacia should have supplied those prices (R.434 at 147:17-149:12; A.Ap. at 688-90), rather than "allowing" First DataBank to publish AWPs. The State then argued that the jury should award the difference between what pharmacists paid for the drugs they dispensed to Medicaid recipients and the amount they were reimbursed – about $650 per pharmacy per year. (R.433 at 45:8-45:10; A.Ap. at 670.) Thus, the State obtained a judgment against Pharmacia for the approximately 7% profit margin the legislature knew pharmacists made when the legislature set reimbursement rates. (A.Ap. at 547.)

ARGUMENT

I. THE STATE'S CLAIMS VIOLATE THE SEPARATION OF POWERS DOCTRINE AND PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS.

The trial court should have dismissed this case because it violates the separation of powers doctrine and because the State's claims involve non-justiciable political questions.

The State's theory was that DHFS would have persuaded the legislature to make "better" decisions had Pharmacia provided AWPs that were the average of actual prices pharmacies paid to wholesalers. (R.435 at 71:15-74:17, 183:2-184:1; A.Ap. at 704-07, 718-19.)

Witness after witness told this story. The State's liability expert opined, "[t]ransparency is necessary for public officials to set appropriate reimbursement rates." (R.434 at 50:19-50:23; A.Ap. at 681.) The State's witnesses testified it would have been "helpful" to know actual prices at which pharmacists acquired drugs, because "the dynamics of any discussion [in the legislature] would have been very different." (R.435 at 183:9-183:10; A.Ap. at 718.) Or, as the State's liability expert testified, "facts trump politics." (R.435 at 73:15; A.Ap. at 706.)

None of this is to be resolved by the courts. Whether the legislature had all the information about budget issues it wanted or needed is for the legislature to resolve.

A. The State's Claims Violated The Separation Of Powers.

"Each branch [of government] has exclusive core constitutional powers into which other branches may not intrude." *State v. Horn,* 226 Wis.2d 637, 643, 594 N.W.2d 772 (1999). In these core areas, "any

exercise of authority by another branch of government is unconstitutional." *State v. Chvala*, 2004 WI App 53, ¶ 44, 271 Wis.2d 115, 147, 678 N.W.2d 880, *aff'd* 2005 WI 30, 279 Wis.2d 216, 693 N.W.2d 747 (emphasis supplied); *In re Grady,* 118 Wis.2d 762, 775, 348 N.W.2d 559 (1984).

One such core area is determining Medicaid reimbursement rates. The legislature sets the formula as part of the biennial budget process, and Article VIII, §§ 2 and 5 of the Wisconsin Constitution exclusively empower the legislature to make budget appropriations.[6] *Flynn v. Dep't of Admin.*, 216 Wis.2d 521, 540, 576 N.W.2d 245 (1998).

In setting the Medicaid reimbursement formula, the legislature chose to use AWP rather than other available pricing information it knew corresponded more closely to prices pharmacies actually pay (A.Ap. at 293-96; *see also* R.439 at 156:21-157:6, 166:2-166:24; A.Ap. at 789-90, 796), and to apply a discount to AWP that still allowed pharmacies to recoup a profit (A.Ap. at 359, 374).

These decisions—and the information used to make them—were strictly the legislature's prerogative. As the trial court recognized, "raw

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[6] This power is subject to the Governor's Art. V, §10 authority to approve or veto bills that pass the legislature.

politics . . . drove (and continues to drive) this issue at the State Capitol, in which both the legislative and executive branches fully participated and in which compromises (unrelated to Pharmacia) were made that knowingly sacrificed more accurate reimbursement formulas even up through the current budget." (A.Ap. at 170.) As the trial court recognized, the legislature and the Governor were not making a factual judgment about how much pharmacists were paying for prescription drugs; they were making a political judgment as to what reimbursement pharmacists would accept. (*Id.*) The judicial branch may not reevaluate this judgment.

The intrusion here is particularly stark. To justify its claim for damages, the State argued that the political process would have resulted in lower reimbursement if the legislature had received different pricing information. (R.441 at 58:15-58:17; A.Ap. at 840 ("[I]f the State of Wisconsin had received true prices, would it have done anything differently?").) In refusing to instruct on mitigation, the trial court recognized that a court cannot tell the legislature and Governor that "[y]ou have a duty to change your formula here because a jury in Dane County has told you to do that." (R.441 at 32:6-32:8; A.Ap. at 839.) Such a ruling would violate "separation of powers," because the court "cannot step into

the legislature and governor's business in setting the appropriations in this state." (R.441 at 32:3-32:5; A.Ap. at 839.) Yet that is exactly what happened when the jury was asked to decide falsity, causation, and damages. In this case, such decisions required the jury to evaluate why the legislature did what it did, and to divine what it would have done under different circumstances. *See Town of Beloit v. City of Beloit*, 37 Wis.2d 637, 155 N.W.2d 633 (1968) (courts cannot determine whether acts of a municipality were in the public interest). No jury may decide whether, under other circumstances, the legislature would, should, or might have made different decisions. *See, e.g., Mills v. Vilas County Bd. of Adjustments*, 261 Wis.2d 598, 608, 660 N.W.2d 705 (Wis. Ct. App. 2003); *State v. Ross*, 259 Wis. 379, 48 N.W.2d 460 (1951); *Hillside Transit Co. v. Larson*, 265 Wis. 568, 580, 62 N.W.2d 722 (1954). That is precisely what happened in this case.

B. The State's Claims Present Non-Justiciable Political Questions.

A case presents a non-justiciable political question in any of six circumstances: (1) textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) lack of judicially discoverable and manageable standards for resolving it; (3) impossibility of

deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) impossibility of a court undertaking independent resolution without expressing a lack of respect due coordinate branches of the government; (5) unusual need for unquestioning adherence to a political decision already made; or (6) potential embarrassment from multifarious pronouncements by various departments on one question. *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). A case should be dismissed if *one* of these factors is "inextricable" from the case. *Baker*, 369 U.S. at 217. This case should have been dismissed under at least five *Baker* factors.

First, there is a textually demonstrable constitutional commitment to have the legislature resolve the issues litigated here. *Baker*, 369 U.S. at 217. The legislature has the exclusive power to make decisions on state spending, Wis. Const. art. VIII §§ 2 & 5, including how the State reimburses pharmacists under the Medicaid program.

Second, there is a lack of judicially discoverable and manageable standards for resolving the State's claims. *Baker*, 369 U.S. at 217. There is no standard by which a jury may properly assess whether the "raw politics" of the budget process were affected by the absence of information,

determine whether certain information, opinions, or lobby pressures affected a legislative decision, or quantify what impact such information would have had on ultimate legislative decisions. Faced with claims that would "pull the court deep into the thicket of the health care finance industry, an economic arena that courts are ill-equipped to meddle in," courts abstain from considering them. *Desert Healthcare Dist. v. PacifiCare FHP, Inc.*, 94 Cal. App. 4th 781, 796 (Cal. Dist. Ct. App. 2001). Other courts, confronted with claims involving complex economic policies, have done likewise. *Shamsian v. Dep't of Conservation*, 136 Cal. App. 4th 621, 626, 642 (Cal. Dist. Ct. App. 2006); *Saxton v. Carey*, 378 N.E.2d 95, 98-99 (N.Y. 1978); *Jones v. Beame*, 380 N.E.2d 277, 279-80 (N.Y. 1978); *Abrams v. New York City Transit Auth.*, 355 N.E.2d 289, 290 (N.Y. 1976).

Third, what Medicaid should have paid pharmacies requires an initial policy determination not intended for judicial discretion. *Baker*, 369 U.S. at 217. The State must provide reimbursement sufficient to ensure that pharmacists will participate in the Medicaid program, while considering fiscal concerns. 42 C.F.R. §§ 447.204, 447.512. The legislature strikes this balance with input from Medicaid, pharmacists, and other constituents. (A.Ap. at 270-78, 473-78.) Medicaid reimbursement

rates are set in a political process affected by many factors, including pressure from special interests. (*See* R.433 at 48:23-50:9; R.437 at 185:24-186:20; R.439 at 245:22-247:21; A.Ap. at 673-75, 769-70, 818-20.) For example, in 1998, when DHFS asked to reduce reimbursement by 8%, Governor Tommy Thompson assured the pharmacists' lobby:

> I understand your concern regarding the 1999-2001 biennial budget request from [DHFS] to reduce the Medicaid reimbursement rate to pharmacies. Rest assured I remain committed to protecting the interests of pharmacies throughout the state of Wisconsin and will not approve this request to reduce the Medicaid pharmacist reimbursement in the 1999-2001 biennial budget.

(A.Ap. at 523 (emphasis supplied).)

Fourth, it was impossible to adjudicate this case without undermining the legislative branch. *Baker*, 369 U.S. at 217. The legislature knew it was affording pharmacists a profit on Medicaid reimbursement. (*See, e.g.*, A.Ap. at 348, 359, 374.)[7] At the same time DHFS urged the legislature to cut reimbursement, pharmacies urged the legislature to keep reimbursement rates high. (R.439 at 245:22-247:21; A.Ap. at 818-20; *see also* A.Ap. at 8.) It is quintessentially the job of the legislature to reconcile such competing demands and make a policy choice.

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[7] In fact, even if the information presented to the legislature had been wrong, it would still be non-justiciable. *See Cudahy Junior Chamber of Commerce v. Quirk*, 41 Wis.2d 698, 704 (1969).

A lack of respect for the legislative process is inherent in allowing a jury to decide that the legislature made the "wrong" choice.

Fifth, when the legislature has determined that pharmacies should be paid a profit, a court's determination that they should not be paid a profit—and that the legislature would have, or should have, reached that decision, if only it had the information that a Dane County jury was provided—leads precisely to the potential embarrassment that the political question doctrine requires courts to avoid. *Baker*, 369 U.S. at 217.

In allowing this case to go forward, the trial court permitted DHFS to make an end-run around the legislature. In entering judgment, DHFS got from the judiciary what it could not achieve through the political process. The claims should have been barred under the separation of powers and political question doctrines.

II. THE TRIAL COURT ERRED IN NOT DISMISSING THE STATE'S § 100.18 CLAIM.

The State's § 100.18 claims should have been dismissed because: (1) Pharmacia made no false, deceptive, or misleading statements; (2) the State could not establish causation given that it knew AWPs were not actual prices; and (3) Pharmacia had no obligation under § 100.18 to publish the actual prices at which wholesalers sold its drugs.

A. Published AWPs Were Not Untrue, Deceptive, Or Misleading.

Wisconsin's Deceptive Trade Practices Act prohibits sellers of products from "mak[ing]" or "caus[ing] . . . to be made . . . representation[s] of any kind to the public" that contain an "assertion, representation or statement of fact which is untrue, deceptive or misleading." Wis. Stat. § 100.18(1) (2007-2008).[8] The State claimed that the AWPs First DataBank published for Pharmacia's drugs were "untrue, deceptive, and misleading" because they were not actual averages of the prices pharmacists paid wholesalers. (A.Ap. at 90-91.) This is simply wrong: the State never understood AWP to mean actual averages of wholesale prices. *See State v. Am. TV & Appliance of Madison, Inc.*, 146 Wis.2d 292, 300-02, 430 N.W.2d 709 (1988) (for purposes of § 100-18 claim, statements must be considered in context).

DHFS employees never thought AWP was an actual price. (R.435 at 115:14-115:16; R.436 at 64:15-65:2; A.Ap. at 708, 726-27.) Indeed, they referred to AWP, colloquially, as "ain't what's paid." (A.Ap. at 291.) The legislature knew AWP was not an actual price, and understood it was a

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[8] All citations to the Wisconsin Statutes are to the 2007-2008 version, unless otherwise noted.

"sticker price" (A.Ap. at 348), a "list price" (A.Ap. at 335), a "reference price" (A.Ap. at 532), or a "starting point for . . . price negotiations" (A.Ap. at 221). In closing argument, the State conceded that "Wisconsin knew that AWP wasn't a true price . . . Every one of our witnesses got up and told you, we knew that." (R.441 at 86:21-86:25; A.Ap. at 849.) Thus, AWPs were not "untrue, deceptive, or misleading," but were exactly what the State understood them to be. *See Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 512-513 (7th Cir. 2009) (holding, in Lanham Act false advertising case, that the meaning of a "literally false" statement must be "considered in context and with reference to the audience to which the statement is addressed"). Indeed, the Alabama Supreme Court reversed jury verdicts against three manufacturers in similar AWP cases for this very reason. *AstraZeneca LP v. State*, __ So. 3d __, 2009 WL 3335904 (Ala. Oct. 16, 2009) (publication pending).

The State's reliance on § 100.18(10)(b) fares no better. That section provides: "It is deceptive to represent the price of any merchandise as a . . . wholesaler's price . . . unless the price is not more than the price which retailers regularly pay for the merchandise." Wis. Stat. § 100.18(10)(b). However, "it is a paramount rubric of statutory construction that a part of a

statute, no matter how plainly expressed, ought not be read to produce a result that defeats the objective of the statutory enactment." *State ex rel. Rupinski v. Smith*, 2007 WI App 4, ¶ 29, 297 Wis.2d 749, 728 N.W.2d 1; *see also State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 49, 271 Wis.2d 633, 681 N.W.2d 110 ("a plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose"); *Scott v. Garth*, 221 Wis.2d 781, 797, 586 N.W.2d 21 (Ct. App. 1998) (rejecting literal reading of statute that stood in "irreconcilable conflict" with the "all-pervasive goal" of the statute). The purpose of § 100.18 is to "protect the residents of Wisconsin from any untrue, deceptive or misleading representations made to promote the sale of a product." *State v. Automatic Merchandisers of America*, 64 Wis.2d 659, 663, 221 N.W.2d 683 (1974). Allowing a plaintiff that was not deceived to recover under § 100.18 contravenes that purpose. *See Smith*, 297 Wis.2d 749, ¶ 29 ("[e]ven 'plain meaning' must yield when faced with the threat that the intent of the law giver may be subverted").

Moreover, applying § 100.18(10)(b) in the context of this case is inconsistent with the biennial budgets. *See Circuit Court for Dane County*, 271 Wis.2d 633, ¶ 46 (finding Wisconsin courts will interpret statutes "in

relation to the language of . . . closely related statutes"). The biennial budgets were "closely-related" because they set reimbursement formulas, and they recognized that AWP is not "the price which retailers regularly pay for the merchandise." Application of § 100.18(10)(b) to pharmacy reimbursement necessarily assumes AWP represents prices that pharmacists actually pay to wholesalers, and that assumption cannot be reconciled with what the legislature actually knew and did in the budget. *See AstraZeneca*, 2009 WL 3335904, at *15 (finding Alabama's reimbursement methodology itself demonstrated the State knew AWP was not an actual average price paid).

Finally, a strict reading of § 100.18(10)(b) would lead to an absurd result: it would allow the State to use AWPs in reimbursement, knowing AWPs were not the prices at which retailers bought drugs, and then sue because AWPs were not the prices at which retailers bought drugs. *See Circuit Court for Dane County*, 271 Wis.2d 633, ¶ 46 (courts will interpret statutes "reasonably, to avoid absurd or unreasonable results").

B. The State Could Not Establish Causation.

Recovery of damages under § 100.18(1) requires proof that plaintiff suffered a pecuniary loss "because of a violation of this section." Wis. Stat.

§ 100.18(11)(b)2. Thus, the State had to show that a misrepresentation by Pharmacia "materially induced (caused) a pecuniary loss to the plaintiff." *Novell v. Migliaccio*, 2008 WI 44, ¶ 49, 309 Wis.2d 132, 749 N.W.2d 544; *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶ 35, 301 Wis.2d 109, 732 N.W.2d 792 ("proving causation in the context of § 100.18(1) requires a showing of material inducement"). Causation under § 100.18 requires proof that someone was induced by a false statement to do something he otherwise would not have done, and a resulting injury. *See Novell,* 309 Wis.2d 132, ¶¶ 13-15, 49 (defendants' misrepresentation induced plaintiff to buy defective house); *K&S Tool & Die Corp.,* 301 Wis.2d 109, ¶ 5-10, 19 (defendant's misrepresentation induced plaintiff to buy defective press); *Torres Enters., Inc. v. Linscott*, 142 Wis.2d 56, 61-64, 70, 416 N.W.2d 670 (Ct. App. 1987) (defendant's misrepresentation induced consumers not to buy plaintiff's frozen custard).

Here, the State conceded that it cannot prove why the legislature "did what it did regarding pharmacy reimbursement." (A.Ap. at 15.) Thus, the State cannot prove inducement.

Although reliance is not a separate element of a § 100.18 claim, reliance is an aspect of causation. Without reliance, the State cannot prove

Pharmacia's alleged misstatements materially induced (caused) Wisconsin's alleged loss. *Novell,* 309 Wis.2d 132, ¶ 36; *see also Torres*, 142 Wis.2d at 70 ("We interpret sec. 100.18(11)(b)2 as requiring some proof beyond the content of the advertisement itself to establish that the plaintiff was in fact damaged by it."); *Valente v. Sofamor*, 48 F. Supp. 2d 862, 874 (E.D. Wis. 1999). Stated succinctly, "if no one is or could be fooled, no one is or could be hurt." *Schering-Plough*, 586 F.3d at 512-13.

Here, the alleged "misrepresentations" were the AWPs First DataBank published for Pharmacia's drugs. (A.Ap. at 65-66.) But the State never relied on AWPs as representing average prices charged by wholesalers to pharmacies and therefore was not induced by Pharmacia to act as it did. (R.441 at 86:21-86:25; A.Ap. at 849 ("Wisconsin knew that AWP wasn't a true price . . . Every one of our witnesses got up and told you, we knew that."); *see also* A.Ap. at 116.) To the contrary, at every step in setting reimbursement rates, the legislature knew that: AWPs were not reflective of actual acquisition prices (A.Ap. at 348); AWPs exceeded the cost at which pharmacists purchased drugs (A.Ap. at 191); and AWPs provided pharmacists a profit margin on reimbursement (A.Ap. at 374, 547). The State, quite simply, was never deceived.

Finally, the State's inability to prove causation is particularly clear with respect to generic drugs, because they were reimbursed based on MACs, which were set without regard to AWPs or any other published prices. (R.436 at 94:10-100:13; A.Ap. at 730-36; *see also* A.Ap. at 51-52, 54-55.) The State cannot have relied on AWPs when it did not use AWPs.

C. The Theory That Pharmacia Failed To Disclose "Actual" Prices Is Not Actionable Under § 100.18.

Acknowledging it could not prove deceit, the State shifted to a theory that Pharmacia should have provided the State with the actual prices pharmacists paid for drugs. As one State witness testified, "[w]e are aware that all AWPs are inflated, except we have no way to get the true price because the manufacturers won't give it to us." (R.436 at 203:9-203:12; A.Ap. at 753.) This is a theory of nondisclosure which is not actionable under § 100.18.

Complex federal statutes and regulations govern the price reporting practices of pharmaceutical manufacturers like Pharmacia. 42 U.S.C. § 1396a, *et seq.*; 42 C.F.R. Ch. 447. The State did not claim that Pharmacia failed to comply with its price reporting obligations under these statutes. Instead, it claimed that Pharmacia should have made additional disclosures that were neither contemplated nor required by that statutory scheme. The

trial court even recognized that requiring such disclosure "could completely muck up the pricing system in the interstate commerce of drugs." (R.445 at 9:20-22, 10:9-11:14; A.Ap. at 875-77.)

Nevertheless, the State's liability expert opined that "[t]ransparency is necessary for public officials to set appropriate reimbursement rates." (R.434 at 50:19-50:23; A.Ap. at 681.) He told the jury that price transparency was "absolutely critical" to the State of Wisconsin, because "you need to have price transparency in order for the system to work." (R.434 at 51:1-51:12; A.Ap. at 682.) The State's witnesses then testified that it would have been "helpful" to know the actual prices at which pharmacists acquired drugs, not because it would eliminate the political tug-of-war in the legislature, but because "the dynamics of any discussion would have been very different." (R.435 at 183:9-183:10; A.Ap. at 718.) Or, as State's liability expert testified, "facts trump politics." (R.435 at 73:15; A.Ap. at 706.)

Thus, the State's claim was based on the theory that Pharmacia violated § 100.18(1) by not disclosing "true" prices. (R. 441 at 86:20-87:4; A.Ap. at 849-50 ("[A]s early as . . . 1976, 1984, 1989, State of Wisconsin knew that AWP wasn't a true price. . . . [T]he problem was we just didn't

know the price. . . . [T]he pharmaceutical manufacturers, Pharmacia, would not give us true prices. . . .").)

A failure to disclose is not actionable under § 100.18(1). *See Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 40, 270 Wis.2d 146, 677 N.W.2d 233. In *Tietsworth*, the Wisconsin Supreme Court held § 100.18(1) does not impose a duty to disclose; rather, it "prohibits only affirmative assertions, representations, or statements of fact that are false, deceptive, or misleading." *Id.* "Silence—an omission to speak—is insufficient to support a claim under Wis. Stat. § 100.18(1)." *Id.* Because the State's case was based on a theory the law does not recognize, it should have been dismissed.

III. THE TRIAL COURT ERRED IN NOT DISMISSING THE STATE'S MEDICAID FRAUD CLAIM.

A. The State Could Not Pursue A Wis. Stat. § 49.49(4m)(a)2 Claim Because AWPs Were Not "False."

Wisconsin's Medicaid fraud statute makes it a violation to "[k]nowingly make or cause to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment" in connection with a medical assistance program. *See* Wis. Stat. § 49.49(4m)(a)2. The State's theory was not that it believed AWPs for

Pharmacia's drugs were actual prices paid by pharmacies, but that Pharmacia failed to disclose "true" prices pharmacists paid wholesalers for drugs. *See, supra*, Argument Section II.C. The Wisconsin Supreme Court distinguishes between misrepresentations of facts and failures to disclose facts, and courts will not extend a statute proscribing affirmative misrepresentations to failures to disclose. *See, supra*, Argument Section II.C; *Tietsworth*, 270 Wis.2d 146, ¶¶ 39-40.

B. The State Improperly Applied Wis. Stat. § 49.49(4m)(a)2 To Statements Used In Determining The Level Of Reimbursement For Pharmacists.

To be actionable, a false statement must be "for use in determining rights to a benefit or payment." *See* Wis. Stat. § 49.49(4m)(a)2 (emphasis added). The State interpreted this provision as applicable to statements for use in establishing the amount of reimbursement a pharmacy has a right to receive from by Wisconsin Medicaid. (A.Ap. at 94.) It then used this reading of the statute to proceed against a defendant that received neither a benefit or payment from Wisconsin Medicaid. This was error for three reasons.

First, statutes imposing forfeitures must be strictly construed. *See State v. James*, 47 Wis.2d 600, 602, 177 N.W.2d 864 (1970). Construed

strictly, "right" as used in § 49.49(4m) means "entitlement." The subsection applies to statements used to determine whether a recipient is entitled to a benefit, or a provider is entitled to a payment. Thus, violation would require a misstatement regarding entitlement to a payment, such as a claim for reimbursement for services never performed. *See, e.g., State v. Williams*, 179 Wis.2d 80, 85-86, 505 N.W.2d 468 (Ct. App. 1993).

A pharmacy that provided drugs to a Medicaid recipient was entitled, by law, to reimbursement. AWP was not used to determine the pharmacy's entitlement to such reimbursement. Indeed, Wisconsin pharmacists did not submit AWPs on their claim forms. (R.436 at 68:15-69:16; A.Ap. at 728-29.) Rather, Medicaid required pharmacists to list their "usual and customary charge," the amount the pharmacist would have charged a cash-paying customer for the drug. (*Id.*) The State independently applied the BlueBook AWPs to the pharmacist's claim to set the amount of the reimbursement. (*Id.*)

Second, the use of § 49.49(4m) in this case was inconsistent with related statutes, including the budget bills, which were premised on AWP exceeding acquisition prices. *See State v. Grunke*, 2008 WI 82, ¶ 22, 308 Wis.2d 439, 752 N.W.2d 769 (interpreting statutory language "in the

context in which those words are used"). The application of § 49.49(4m) to the AWPs First DataBank published, which the State chose to use in its reimbursement methodology, is inconsistent with these more specific laws. *See State ex rel. Rupinski v. Smith,* 2007 WI App 4, ¶ 19, 297 Wis.2d 749, 728 N.W.2d 1 (statutes must be construed so "they are harmonious"); *State v. Machgan*, 2007 WI App 263, ¶ 7, 306 Wis.2d 752, 743 N.W.2d 832 (specific statute controls over more general one); *Estate of Gonwa v. DHFS,* 2003 WI App 152, ¶ 32, 265 Wis.2d 913, 668 N.W.2d 122 (same, in context of Medicaid).

Finally, application of § 49.49(4m)(a)2 in this case allowed the State to recover under a statute designed to protect against fraud even though the State was not defrauded. *See Grunke*, 308 Wis.2d 439, ¶ 21 (statutory language should be interpreted "'reasonably, to avoid absurd or unreasonable results'" (quoting *Circuit Court for Dane County*, 271 Wis.2d 633, ¶ 46)). To the extent published AWPs factored into the amount of payments to pharmacists, it resulted not from any conduct on the part of Pharmacia, but from the choices made by the State. The State chose to base reimbursement on a discount from AWPs, rather than another benchmark or actual acquisition cost. (R.439 at 156:21-157:6, 166:2-166:24; A.Ap. at

789-90, 796; *see also* A.Ap. at 293-96.) The State chose to purchase AWPs from First DataBank, rather than acquire pricing information from pharmacists, wholesalers, manufacturers, or another source. (*Id.*) And the State made these choices knowing AWPs exceeded actual drug costs, and that its reimbursement formula gave pharmacists a profit. *See, supra,* Statement of the Case Section III.A.

IV. THE TRIAL COURT ERRED IN SUPPLYING AN ANSWER TO A SPECIAL VERDICT QUESTION.

A. The Trial Court Had No Ability To Answer A Special Verdict Question More Than 90 Days After The Verdict.

A trial court must decide all motions after verdict within 90 days. Wis. Stat. § 805.16(3). This deadline cannot be enlarged. Wis. Stat. § 801.15(2)(c); *Brandner v. Allstate Ins. Co.*, 181 Wis.2d 1058, 1070-71, 512 N.W.2d 753 (1994); *Schmorrow v. Sentry Ins. Co.*, 138 Wis.2d 31, 37-38, 405 N.W.2d 672 (Ct. App. 1987). Here, the jury verdict was reached February 16, 2009. In response to Special Verdict Question No. 5, "[h]ow many . . . false statements or representations of material fact for use in determining rights to a Wisconsin Medicaid payment did Pharmacia Corporation knowingly make or cause to be made," the jury answered 1,440,000. (A.Ap. at 146.) The State argued this number should be used in

setting forfeitures under § 49.49(4m). On May 15, 2009, the trial court vacated the jury's answer to Special Verdict Question No. 5. (A.Ap. at 150.) The trial court found that "rather than requesting the jury to calculate the number of the false statements . . . made or cause to be made by Pharmacia . . . the State urged the jury in closing argument to equate the number of violations subject to forfeitures with the number of reimbursement claims made by pharmacies" that were paid by Wisconsin Medicaid. (A.Ap. at 149.) The trial court correctly held this number did not measure Pharmacia's conduct and could not be the basis for forfeitures. (A.Ap. at 151); *United States v. Bornstein*, 423 U.S. 303, 313 (1976) ("the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures").

Rather than leaving the State to suffer the consequences of its own faulty argument to the jury, the trial court came to the State's rescue. On September 30, 2009, more than 90 days after verdict, the trial court supplied its own answer to Special Verdict Question No. 5. (A.Ap. at 162-71.) Pursuant to Wis. Stat. § 805.16(3), that decision is a nullity.

The trial court was "not confident" in its "continuing competence to decide forfeiture issues." (A.Ap. at 158, 160.) The court nevertheless

proceeded on the grounds that supplying an answer to a special verdict question was akin to a ruling on awarding attorneys' fees or injunctive relief. (A.Ap. at 160.) This was error. Section 805.14(5)(c) specifically characterizes a "motion to change answer" as a "motion after verdict." The trial court's characterization of its decision to answer the special verdict question as "resolv[ing] the fallout" from its earlier, timely ruling is equally unavailing. The trial court lost competency to rule on this matter on May 17, 2009. It could not "relate back" an otherwise untimely post-verdict decision to an earlier, timely decision. *Brandner*, 181 Wis.2d 1058, 1070-71 & n.10. The trial court's September 30, 2009 decision was invalid and the forfeiture award cannot stand.

B. The Trial Court Erred In Permitting The State A Second Opportunity To Prove An Element Of Its Claim.

Over Pharmacia's objections, the State sought and obtained a jury determination of the number of violations of § 49.49(4m). (A.Ap. at 30.) The State made a strategic decision to urge the jury to determine the number of violations based on the number of times the State reimbursed pharmacists for a Pharmacia drug, rather than the number of alleged misrepresentations. (R.441 at 108:23-109:15; A.Ap. at 851-52.) In the words of the trial court, "[i]n short, plaintiff went 'all in' on a predictably

losing long shot, leaving a mess behind for the court to clean up." (A.Ap. at 163.)

Subsequently, the State urged the trial court to sit as a second trier of fact, to conduct a second evaluation of the evidence on the forfeitures issue, over seven months after verdict. (A.Ap. at 97-98, 163.) The trial court did so despite acknowledging that "the credible evidence on this question is scant at best, widely scattered, and none too clear . . . mostly due to the plaintiff's adopting an unsustainable theory of recovery." (A.Ap. at 163.) The trial court's own characterization of what was presented at trial was at odds with the State's burden to prove its forfeiture claim to a reasonable certainty by clear, satisfactory, and convincing evidence. WIS JI-CIVIL 205.

Further, the State conceded at trial it had failed to offer evidence of the number of statements that had been made to the State, and therefore withdrew its claim for forfeitures under § 100.18. (R.441 at 6:20-6:23; A.Ap. 828A; *see also* R.351 at 7-8.) Both §§ 100.18 and 49.49 proscribe false statements, and the State's concession that it had not proven a particular number of statements so as to sustain a forfeiture claim under § 100.18 is equally applicable to its claim under § 49.49.

The trial court's decision to give the State a "do over" on forfeitures was error. Parties to litigation are responsible for the consequences of deliberate strategic decisions. *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 51, 303 Wis.2d 94, 735 N.W.2d 418. Moreover, "no rule of law . . . permits a party . . . a second opportunity to prove a crucial element of its case" when it was afforded that opportunity and "the element on which it failed to discharge its burden was clearly and unequivocally an issue at trial."[9] *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 639, 273 N.W.2d 233 (1979).

V. THE TRIAL COURT ERRED IN GRANTING THE STATE A JURY TRIAL.

Because neither § 100.18 nor § 49.49 expressly provides for trial by jury, any right to a jury must be based in art. I, § 5 of the Wisconsin Constitution. *Harvot v. Solo Cup Co.*, 2009 WI 85, ¶ 62, 320 Wis.2d 1, 768 N.W.2d 176 (quoting *Town of Burke v. City of Madison*, 17 Wis.2d 623, 635, 117 N.W.2d 580 (1962)). A party has a constitutional right to a jury trial for statutory claims only when (1) the cause of action created by the

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[9] These principles are particularly pertinent here, where the plaintiff is the State and the case was pursued as a "law enforcement action." A punitive proceeding is subject to the prohibition of double jeopardy, regardless of whether denominated as civil. *State v. McMaster*, 206 Wis.2d 30, 43, 556 N.W.2d 673 (1996).

statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848, and (2) the action was regarded at law in 1848. *Harvot*, 320 Wis.2d 1, ¶ 64. To satisfy this test, the statutory cause of action must be "essentially the *counterpart*" of a cause of action existing in 1848. *Id.* at ¶¶ 71-72 (emphasis in original). A statutory cause of action is essentially a counterpart when it (a) shares a similar purpose and (b) has the same elements as a cause of action existing and recognized as at law in 1848. *Id.* at ¶¶ 64, 69, 72; *State v. Schweda*, 2007 WI 100, ¶ 42, 303 Wis.2d 353, 374, 736 N.W.2d 49. Sections 100.18 and 49.49 meet neither standard.

A. There Is No Constitutional Right To A Jury On A § 100.18 Claim.

In *State v. Ameritech*, the Court of Appeals determined § 100.18 does not carry a constitutional right to a jury. 185 Wis.2d 686, 698, 517 N.W.2d 705 (Ct. App. 1994), *aff'd* 193 Wis.2d 150, 532 N.W.2d 449 (1995); *see also Kailin v. Armstrong*, 2002 WI App 70, ¶ 40, 252 Wis.2d 676, 643 N.W.2d 132 (section 100.18 creates a "distinct statutory cause of action" that has no common law component). The trial court erred in concluding that *Ameritech* was no longer controlling. (*See* A.Ap. at 131.) The Wisconsin Supreme Court has since cited *Ameritech* with approval

with respect to § 100.18 claims. *See Harvot*, 320 Wis.2d 1, ¶ 49 ("'[T]here is no dispute that in 1848, the State had no right to commence a civil suit to collect forfeitures for deceptive advertising or violation of the [Wisconsin Consumer Act]. Thus, *any right to a jury trial would be by legislative grant rather than constitutionally protected.*'") (quoting *Ameritech*, 185 Wis.2d at 698) (emphasis added by *Harvot*).

B. There Is No Constitutional Right To A Jury On A § 49.49 Claim.

Section 49.49 shares neither a similar purpose with, nor the essential elements of, a common law claim existing in 1848. A statute cannot have a similar purpose to a common law claim if it regulates a matter the common law did not. In *Harvot*, the Wisconsin Supreme Court refused to find a right to a jury for a claim brought pursuant to Wisconsin's Family or Medical Leave Act ("FMLA"), because the FMLA is modern social legislation that did not have an essential counterpart in 1848. Similarly, the "medical assistance" on which the State's § 49.49(4m) claim is premised did not exist until more than a century after the adoption of the Wisconsin Constitution. *See* Wis. Stat. § 49.45 (eff. July 1, 1966). Like the FMLA at issue in *Harvot*, § 49.49 is precisely the sort of "modern social legislation" that was "quite unheard of in 1848." *Harvot*, 320 Wis.2d 1, ¶ 80.

The essential elements of a § 49.49 claim also differ from common law causes of action existing in 1848. A claim under § 49.49(4m) requires that a statement be "for use in determining rights to a benefit or payment" under Wisconsin Medicaid. Although requiring a materially false statement, § 49.49 is designed to "regulate more subtle and attenuated harm" than common law fraud—namely the submission of false claims to the medical assistance program. *Schweda*, 303 Wis.2d 353, ¶ 35 (comparing statutory environmental claim to common law nuisance claim and finding former provides no right to jury trial).

Furthermore, common law fraud requires the showing of actual harm, whereas forfeitures under § 49.49(4m) do not. As in *Schweda*, "where such a vital aspect of a common law . . . cause of action, i.e., harm, is not part of a contemporary cause of action, . . . the two are not sufficiently analogous" to give rise to a constitutional right to a jury. *Id.* at ¶ 42. Lacking any common law counterpart, § 49.49 does not carry with it a constitutional right to a jury trial. Finally, § 49.49(6) provides for restitution, not common law damages. *See* Wis. Stat. § 20.455(1)(hm) (eff. until 2010). Because restitution is a purely equitable remedy, no right to a

jury attaches. *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶ 79, 262 Wis.2d 32, 662 N.W.2d 652.

VI. THE TRIAL COURT ERRED BY NOT PERMITTING THE JURY TO CONSIDER WHETHER AND TO WHAT EXTENT THE STATE HAD FAILED TO MITIGATE ITS CLAIMED DAMAGES.

This case should not have gone to the jury at all. The trial court compounded this error when it refused to submit a Special Verdict question asking whether the State failed to mitigate the damages it claimed, and if so, to what extent. (R.441 at 22:11-25:10; A.Ap. at 829-32.)

The court's rationale was that the jury could not consider whether the Legislature "should have" done something different with respect to Medicaid reimbursement:

> [T]he only act that has been brought to my attention which can be used as a mitigation is a change in the legislation. And I cannot tell them to do that. That's a separation of powers thing. I cannot step into the legislature and the governor's business in setting the appropriations in this state and tell them . . . [y]ou have a duty to change your formula here because a jury in Dane County has told you to do that.

(R.441 at 31:24-32:8; A.Ap. at 838-39.)[10]

Yet, over Pharmacia's objections, the jury was permitted to consider whether the Legislature "would have" done something different if AWPs

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[10] This decision emphasizes how the issues in this case are non-justiciable political questions. *See, supra*, Argument Section I.

had been different. (R.441 at 28:2-30:1; A.Ap. at 835-37.) In other words, the trial court allowed the jury to speculate as to one side of the monetary loss equation (amount) but not the other (mitigation).

No Wisconsin case law immunizes the State from the general obligation to mitigate. "[T]he duty to mitigate is a social and economic policy designed to protect and conserve the welfare and prosperity of the community as a whole," and the State should be prevented from recovering "for wounds which in a practical sense are self-inflicted." *See S.C. Johnson & Son, Inc. v. Morris*, 2010 WI App 6, ¶ 26, 322 Wis.2d 766, 779 N.W. 2d 19 (internal quotation marks and citations omitted). Here, the State's "damages" resulted from its own choice to reimburse based on AWP, knowing that AWP exceeded pharmacists' actual costs, and knowing that it was providing pharmacists with a profit. Whether a plaintiff acted reasonably to mitigate its damages is a question of fact, not law, to be decided by the factfinder. *See Lobermeier v. General Tel. Co.,* 119 Wis.2d 129, 145, 149-50, 349 N.W.2d 466 (1984) (ordering new trial on damages because jury was not given proper mitigation instruction). To the extent this Court concludes there can be a damages award at all, it should remand for a bench trial on mitigation.

VII. THE TRIAL COURT ERRED IN AWARDING DUPLICATIVE, SPECULATIVE DAMAGES.

A. The Jury Could Only Speculate As To What The Legislature "Would Have Done" In Awarding Damages.

In awarding damages, the State's trial theory required the jury to determine what reimbursement level would have been set by the legislature if DHFS had different information with which to counter the political pressure from pharmacy lobbyists.

As the State conceded, what "'the State of Wisconsin' did or did not do with regard to 'AWP'. . . falls squarely and inescapably upon the proper interpretation of the actions of our elected members in the State Legislature and in the Office of the Wisconsin Governor." (A.Ap. at 15.) The State admitted that "there is no person who can testify about why 'the State of Wisconsin' did what it did regarding pharmacy reimbursement." (*Id.*) Yet, in its damages award, the jury necessarily determined that, if different information had been provided by Pharmacia, the legislature would have decided to reimburse pharmacists at 0% profit. This is utter speculation, particularly in light of the political pressure from pharmacists, the State's obligation to ensure that pharmacists voluntarily participate in the Medicaid program, and the undisputed evidence that the legislature repeatedly chose

to include a profit margin in the reimbursement paid to pharmacies. This was contrary to law. *Foseid v. State Bank of Cross Plains*, 197 Wis.2d 772, 791, 541 N.W.2d 203 (Ct. App. 1995) (verdict cannot be based on conjecture).

B. The Damages Awarded Were Duplicative.

The trial court improperly construed the Special Verdict to provide the State with $2 million of duplicative damages. Question No. 3 of the Special Verdict asked the jury to determine the amount of damages incurred after 2001 (specified in Question No. 1), and Question No. 7 of the Special Verdict asked the jury to determine the amount of damages incurred after 1994 (specified in Question No. 4). (A.Ap. at 144-47.) The jury answered Question No. 3 with $2,000,000 and answered Question No. 7 with $7,000,000. (*Id.*)

The two damages questions covered overlapping time periods—from 2001 forward. The sole basis for the claimed damages in both questions was alleged "overpayments" by Medicaid to pharmacists. (R.437 at 10:23-11:15, 32:20-33:5; A.Ap. at 757-60.) Thus, the two questions covered the same time period (2001 forward), the same injury (Medicaid "overpayments"), based on the same conduct ("causing" the publication of

AWPs). The State only "overpaid" once during the overlapping time-period for this alleged conduct. Yet, the trial court allowed the State to recover twice. (*See* A.Ap. at 189 (entering judgment of $9,000,000).)

Under Wisconsin law, damages may be recovered only once for the same harm. *See Hause v. Schesel,* 42 Wis.2d 628, 636, 167 N.W.2d 421 (1969); *Dunham v. Wis. Gas & Elec. Co.*, 228 Wis. 250, 280 N.W. 291, 294-95 (1938) (juries cannot "render verdicts in which the damages are duplicated for the same loss"). This is so regardless of whether different legal theories are asserted. *See Hause*, 42 Wis.2d at 636 (insured who received judgment against agent could not also recover for same damages from the insurer). When there is a specific verdict with multiple damages questions, a reviewing court can readily determine when a jury's damages amount is erroneous. *See Spleas v. Milwaukee & Suburban Transp. Corp.*, 21 Wis.2d 635, 640-41, 124 N.W.2d 593 (1963). That is the case here.

The trial court decided the jury "broke these damages down between the two claims for relief it found were proven by the State." (A.Ap. at 186.) Such a presumption cannot be made when the Special Verdict enabled the jury to give damages for the same injury twice. Accordingly, if the State is entitled to any damages at all, the amount should be limited to

$7,000,000, eliminating the double counting that is evident from the face of the verdict.

VIII. THE TRIAL COURT ERRED BY ADMITTING CERTAIN DOCUMENTS AND TESTIMONY INTO EVIDENCE AT TRIAL.

A reviewing court will grant a new trial where there is "a reasonable possibility that the error contributed to the outcome of the action." *Evelyn C. R. v. Tykila S.*, 2001 WI 110, ¶ 28, 246 Wis.2d 1, 629 N.W.2d 768. Further, "where the outcome of the action or proceeding is weakly supported by the record, a reviewing court's confidence in the outcome may be more easily undermined than where . . . the outcome was strongly supported by evidence untainted by error." *Martindale v. Ripp*, 2001 WI 113, ¶ 32, 246 Wis.2d 67, 629 N.W.2d 698. Here, the trial court's error in admitting irrelevant, prejudicial documents, compounded by the lack of evidence supporting the verdict, warrants a new trial.

A. Admission Of Documents Containing Hearsay, Documents Not Properly Authenticated, And Related Deposition Testimony.

Pharmacia objected to hearsay evidence, specifically with respect to Exhibit P-852. (A.Ap. at 524-25.) This was an e-mail written by an employee of Pharmacia's parent company whom Plaintiff chose not to call

as a witness, relaying what a third-party consultant heard during a conversation with potential customers. (*Id.*) The document constituted hearsay. Wis. Stat. § 908.01(3). The trial court ruled the document was admissible because it went to corporate knowledge (R.432 at 87:12-87:15; A.Ap. at 654), despite the absence of any indication by the State that it intended to use the evidence to show knowledge only. Instead, the State used the document to prove the truth of the matter asserted therein, in violation of Wis. Stat. § 908.02. In fact, the State quoted from P-852 during its closing, arguing it was the "key" to Pharmacia's fraud and directly referring to the hearsay statements by the outside consultant to prove the "truth" of the matter asserted. (R.441 at 71:14-72:10; A.Ap. at 847-48.)

Second, Pharmacia objected to documents that were not properly authenticated. (R.432 at 37:9-40:11, 46:9-48:1; A.Ap. at 604-07, 613-15.) The trial court essentially ruled that any document that had been produced from Pharmacia's files was authentic. (R.432 at 49:9-53:13; A.Ap. at 616-20.) This is not the law. *See* Wis. Stat. § 909.01.

The admission of unauthenticated documents was compounded by the Court's ruling regarding documents shown to corporate designees.

Pharmacia objected to admission of deposition testimony in which its corporate designees were shown documents they had never seen and were asked to confirm that the State's counsel was reading correctly as he read portions of the documents into the record. Pharmacia objected to admission of both the documents and testimony. (R.432 at 37:9-41:11, 46:14-48:1; A.Ap. at 604-08, 613-15.) The trial court ruled that a witness is not required to have first-hand knowledge in order for his or her testimony to be admissible. (R.433 at 8:2-9:6; A.Ap. at 666-67.) This is directly contrary to Wis. Stat. § 906.02. The Court then allowed this evidence to be admitted because "it [bore] on the credibility of the corporation's case." (R.433 at 9:12-9:13; A.Ap. at 667.) These rulings, coupled with the Court's earlier rulings on hearsay and authentication, permitted admission of any document, regardless of origin, authorship, or authenticity, so long as it was produced from Pharmacia's files and read to a corporate designee.

B. Admission Of Irrelevant, Prejudicial Evidence Was Contrary To Interests Of Justice.

The trial court erred by admitting the following evidence: (1) OIG Compliance Program Guidance for Pharmaceutical Manufacturers dated April 18, 2003 ("OIG Guidance"), (A.Ap. at 534-46); (2) RedBook Product

Verification Sheets, (R.304 at P-459, P-461, P-462, P-463, P-464, P-466, P-467, P-468, P-469, P-470; *see, e.g.*, A.Ap. at 479-522); and (3) NAMFCU letter (A.Ap. at 569-71).

First, over Pharmacia's objection (R.432 at 16:22-16:25; R.434 at 143:6-143:12; A.Ap. at 600, 684), the trial court admitted a redacted version of the OIG Guidance. The OIG Guidance was issued as advice to manufacturers regarding effective internal compliance programs and is not relevant to whether Pharmacia violated Wisconsin state law. *See* OIG Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23731 (May 5, 2003). The guidance is not law. *See id.* ("The document is intended to present voluntary guidance to the industry and not to represent binding standards for pharmaceutical manufacturers."). Yet the court allowed the State to argue that Pharmacia's conduct—dating back to 1994—was illegal because it violated federal advice issued in 2003. (R.441 at 65:23-66:21, 68:13-69:17; A.Ap. at 841-42, 844-45.)

Second, the trial court denied Pharmacia's motion to exclude evidence relating to price publishers other than First DataBank, namely RedBook. (R.431 at 198:16-199:5; A.Ap. at 595-96.) Because Medicaid relied only on First DataBank for pricing used in reimbursement (R.434 at

219:17-219:23; A.Ap. at 693; *see also* A.Ap. at 60), evidence relating to other price publishers was not relevant to this case. *See* Wis. Stat. § 904.02. Moreover, the State improperly introduced evidence that Pharmacia verified the prices for its drugs published by RedBook in order to raise the inference that Pharmacia had the same practice with respect to First DataBank. *See State v. Muckerheide*, 2007 WI 5, ¶ 29, 298 Wis.2d 553, 725 N.W.2d 930 ("[I]t is universally established that evidence of other acts 'is not admitted in evidence for the purpose of proving . . . general disposition on the issue of guilt or innocence because such evidence, while having probative value, is not legally or logically relevant to the crime charged.'" (quoting *Whitty v. State*, 34 Wis.2d 278, 291-93, 149 N.W.2d 557)). The State introduced no such evidence as to First DataBank because no such evidence existed.

Third, although the Court ruled that evidence regarding other investigations against Pharmacia or other pharmaceutical manufacturers was likely inadmissible, the Court allowed P-1282, a redacted version of a letter discussing the NAMFCU investigation and subsequent lowering of certain drugs' AWPs into evidence. (R.436 at 137:22-138:16; A.Ap. at 737-38.) On the basis of this document, the State's counsel was permitted

to improperly question witnesses about an outside investigation. (R.436 at 179:5-179:9; A.Ap. at 744 ("Without revealing the source, was there an investigation and then sometime in February 2000 did you become aware that certain manufacturers, including Pharmacia, reported inflated average wholesale prices?"); *see also* R.440 at 119:15-120:20; A.Ap. at 825-26.) Later, the State's counsel used the letter to improperly argue that a federal agency had determined Pharmacia's prices to be false and inflated. (R.441 at 192:16-192:19; A.Ap. at 853 ("That's the report from the federal agency that said to . . . Wisconsin that Pharmacia has falsely inflated some 47 of its drugs.").) This evidence was highly prejudicial and likely led the jury to assume that Pharmacia was guilty of wrongful conduct. *See* Wis. Stat. §§ 904.02, 904.03.

The State had no evidence that Pharmacia ever told Wisconsin Medicaid—or anyone in Wisconsin or elsewhere —that AWPs represented pharmacists' acquisition costs. Thus, the State sought to build its case against Pharmacia entirely on the basis of (1) hearsay statements in unauthenticated documents, (2) communications with a data publisher Wisconsin never used, (3) OIG guidance for internal compliance programs that did not apply and did not exist until shortly before the State filed suit,

and (4) investigations by other government entities. Particularly in the context of a case in which the plaintiff was not deceived, there is more than a reasonable possibility that admission of such evidence contributed to the outcome of the action. Their admission was reversible error. *See* Wis. Stat. §§ 904.02, 904.03, 904.04(2)(a).

IX. THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEYS' FEES AND COSTS.

The trial court awarded the State $6.5 million in attorneys' fees and over $300,000 in litigation expenses. (A.Ap. at 184.) That award was erroneous because: (a) private counsel were not retained until September 2007 and cannot recover fees for any period before they were lawfully retained to represent Wisconsin; (b) the State cannot recover litigation expenses incurred contrary to Wis. Stat. § 165.25; (c) with one exception, Wisconsin Department of Justice ("DOJ") lawyers did not keep track of their time so that anything more than a nominal fee is contrary to law; and (d) the trial court failed to apply the correct methodology for determining fees.

A. Fees Or Expenses For Private Lawyers Must Be Consistent With An Enforceable "Special Counsel" Contract And Comply With Relevant Statutes.

Pursuant to Wis. Stat. § 14.11(2), the Governor may employ private counsel "[t]o assist the attorney general." When private counsel is employed, a written contract must be entered into between the state and such lawyer. *Id.* § 14.11(2)(b). Moreover, when DOJ handles a case on behalf of the State, "[a]ll expenses of the proceedings shall be paid from the appropriation under s. 20.455(1)(d)." Wis. Stats. § 165.25(1m) (emphasis supplied).

Nevertheless, DOJ permitted outside counsel to pursue this case with neither a written contract nor an appropriation. Moreover, when this lawsuit was filed, the Governor expressly told the Attorney General that, while the State could share information with private lawyers, he did "not permit Atty. Barnhill and his associates to represent the state of Wisconsin." (A.Ap. at 108 (emphasis supplied).) Only in September 2007, did the Governor first retain Mr. Barnhill and his associates to represent Wisconsin in this litigation. (A.Ap. at 109-15.) Before September 2007, there was no attorney-client relationship between plaintiff and private

counsel, precluding the State's right to recover fees for this period. Wis. Stat. § 14.11(2).

Similarly, under Wis. Stat. § 165.25(1m), the State can incur litigation expenses only through its budget appropriation, which undergoes legislative approval. Rather than obtaining such approval, the expenses of this case were financed by private counsel. (A.Ap. at 102-03.) This was directly contrary to law.

The trial court rationalized the State's failure to comply with the statutes governing this litigation as a "bargain" for the State. (A.Ap. at 177.) This was an erroneous exercise of discretion, requiring that the award of fees be vacated. *Kocken v. Wis. Counsel 40, AFSCME, AFL-CIO,* 2007 WI 72, ¶ 25, 301 Wis.2d 266, 732 N.W.2d 828 ("If in exercising its discretion a circuit court errs in deciding a question of law upon which its exercise of discretion rests, the circuit court has erroneously exercised its discretion.").

B. The Trial Court Improperly Treated This Case As Involving Ordinary "Fee Shifting" Statutes.

Wisconsin only permits an award of attorneys' fees and costs if, and to the extent, specifically authorized by statute. *Gorton v. Hostak, Henzl & Bichler, S.C.,* 217 Wis.2d 493, 511, 577 N.W.2d 617 (1998). Section

49.49(6) is not a civil "prevailing party" statute. It provides only that DOJ may be awarded "the reasonable and necessary costs of investigation . . . and the reasonable and necessary expenses of prosecution, including attorney fees." The legislature distinguished between "investigation" and "prosecution." Only "prosecution" carries the right to attorneys' fees and only DOJ may receive an award pursuant to this provision. Even absent the plain language of § 49.49(6), Wisconsin law does not permit "fee shifting" to compensate private lawyers in a prosecutorial role. The only statutory authority for such compensation would be as a "special prosecutor" at $40 an hour. Wis. Stat. §§ 978.045(2)(a), 977.08(4m).

Under § 100.18(11)(b), a plaintiff may recover fees and costs only to the extent plaintiff has incurred fees and costs and/or is contractually obligated to pay fees and costs to its counsel. *Gorton*, 217 Wis.2d at 503-04. This is because the purpose of fee-shifting is to make the plaintiff "whole" so that its recovery is not diminished by the reasonable and necessary fees/costs it either paid or is obligated to pay its counsel to obtain such recovery. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 37 & n.15, 303 Wis.2d 258, 735 N.W.2d 93; *Gorton*, 217 Wis.2d at 503-04. In this case, there was no need to make the State "whole" because its fee

agreement with private counsel stated it owed them nothing.[11] (A.Ap. at 111.)

C. The Trial Court Erroneously Exercised Its Discretion By Failing To Apply Key Aspects Of The Lodestar Methodology.

The trial court awarded almost $1 million in fees to DOJ lawyers even though only one lawyer kept track of his time (R.340 at 4; R.326). This was error. *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶¶ 68-70, 261 Wis.2d 4, 660 N.W.2d 666 (reversing trial court fee award where affidavit did not detail amount of time spent on particular services).

Further, the trial court never applied the required "objective framework" for determining reasonable fees. *Bettendorf v. Microsoft Corp.*, 2010 WI App 13, ¶ 30, __Wis.2d __, 779 N.W.2d 34. The first step of such a framework is to determine the reasonable hours expended. *Id.* The trial court simply skipped this step and went directly to factors that are only applied after that initial determination has been made. (R.382; A.Ap. at 176-85.) This was error. *LeMere v. LeMere*, 2003 WI 67, ¶ 14, 262

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[11] There is an exception to this rule when legal services are provided by a non-profit organization free of charge because the plaintiff could not afford counsel. *Gorton*, 217 Wis.2d at 503-05. This exception is not implicated in this case.

Wis.2d 426, 663 N.W.2d 789 (courts erroneously exercise their discretion when they fail to apply the proper standard).

Finally, the trial court did not properly consider the relative success of the State's claims in comparison to the work that was performed. Under *Hensley v. Eckerhart,* 461 U.S. 424 (1983), which Wisconsin courts are to follow, *see Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 30, 275 Wis.2d 1, 683 N.W.2d 58, a court must reduce fees if the relief won is limited in comparison to the entirety of related claims, *Hensley*, 461 U.S. at 440. In this case, the State sued and pursued its claims against over 30 drug manufacturers. However, the State only prevailed against Pharmacia, since it was the first defendant to go to trial. Under *Hensley,* the trial court was required to reduce fees to reflect that work was performed in connection with claims against over 30 defendants but there was success only against one.

CONCLUSION AND REQUEST FOR RELIEF

For all of the foregoing reasons, Pharmacia respectfully requests that this Court reverse the Judgment and dismiss the State's claims with prejudice. To the extent that any of the State's substantive claims are determined to have merit, the Court should remand for a bench trial.

Dated this 24th day of May, 2010.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), WIS. STATS., for a brief and appendix produced with a proportional serif font. The length of this brief is 11,951 words.

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CERTIFICATION

In accordance with § 809.19(12)(f), WIS. STATS., I hereby certify that the text of the electronic copy of the Appellant's Brief is identical to the text of the paper copy of the Appellant's Brief.

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010, I personally caused copies of the Appellant's Brief and Appendix to be mailed by first-class postage prepaid mail to:

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